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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of

The Lutheran Church/Missouri Synod	)	MM Docket No. 94-10
	)	
For Renewal of Licenses of Stations	)	File Nos. BR-890829VC
KFUO/KFUO-FM, Clayton, Missouri	)	BRH-890929VB

TO: Hon. Arthur Steinberg, Administrative Law Judge

**MOTION TO MODIFY HEARING ISSUES**

The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively "NAACP"), by counsel and pursuant to 47 CFR §1.229, respectfully move to restate Hearing Issue #1 by addition of the italicized language below:

To determine the extent to which the licensee of Stations KFUE/KFUE-FM complied with the *nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 CFR §73.2080[.]*

This Motion is not based on newly discovered evidence, but instead is based upon an apparent drafting error in the HDO, FCC 94-23 (released February 1, 1993). Hearing Issue #1 refers only to §73.2080(b), the affirmative action requirement. However, the HDO makes specific findings that implicate the licensee's noncompliance with Section 73.2080(a) of the Rules, the nondiscrimination requirement.<sup>1/</sup> The HDO found that the licensee recruited based on

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<sup>1/</sup> While it is unclear how this error happened, the NAACP notes that the HDO's forfeiture notice also only makes reference to Section 73.2080(b). HDO at 14 ¶37. The omission of Section 73.2080(a) from the HDO's forfeiture notice was correct. There is no "standard forfeiture" for discrimination. See Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules, FCC 94-27 (released February 1, 1994). Discrimination must always result in nonrenewal. See cases cited at 2 infra. It seems likely that the entirely proper omission of Section 73.2080(a) in the HDO's forfeiture notice inadvertently found its way into Hearing Issue #1 as well.

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racial stereotypes. Id. at 9-10 ¶¶23-25. In language reminiscent of Rust Communications Group, Inc. (HDO), 53 FCC2d 355 (1975), the Commission held that these stereotypes "evidence a preconceived notion about the suitability of minorities to perform certain jobs." Id. at 10 ¶26.

The best evidence that the Commission's analysis was not cabined by a perception that only the affirmative action rules (Section 73.2080(b)) were violated is the Commission's express holding that "[i]t would appear that the licensee's reasons for its failure to conduct recruitment at the FM station are inherently discriminatory and not based on the results of any actual recruitment efforts" (fn. omitted; emphasis added). Id. at 10 ¶25.

Since the Commission was silent on why it did not translate that finding of probable discrimination into Hearing Issue #1, the Presiding Judge must infer that the Commission erred inadvertently. The Commission cannot be presumed to have deliberately failed to require trial of a discrimination issue after it has expressly held that an unrebutted prima facie case of discrimination has been made out. Any such deliberate omission would be unlawful. See Beaumont NAACP v. FCC, 854 F.2d 501 (D.C. Cir. 1988); Black Broadcasting Coalition of Richmond v. FCC, 556 F.2d 59 (D.C. Cir. 1977).<sup>2/</sup> The Presiding Judge must impute to the Commission the intention to lawfully carry out Sections 307 and 309 of the Communications Act.

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<sup>2/</sup> Even a single act of discrimination is so invidious as to be grounds for nonrenewal. See Catoclin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990).

Because the HDO was silent on this question, the Presiding Judge is authorized under the Atlantic doctrine to act upon and grant this motion.<sup>3/</sup>

WHEREFORE, Hearing Issue #1 should be modified as requested above.

Respectfully submitted,

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February 21, 1994

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<sup>3/</sup> It could be argued that Hearing Issue #1 already includes the nondiscrimination requirement in 47 CFR §73.2080(a), inasmuch as discrimination is the ultimate example of behavior inconsistent with affirmative action. However, to promote clarity, avoid future evidentiary disputes and preserve the record for appeal, the Presiding Judge should expressly modify the language of Hearing Issue #1 as proposed above.

**CERTIFICATE OF SERVICE**

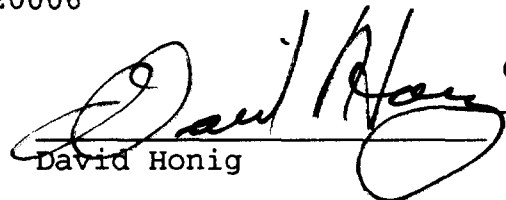
I, David Honig, hereby certify that I have this 21st day of February, 1994, caused a copy of the foregoing "Motion to Modify Hearing Issues" to be delivered as shown below, to the following:

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